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VIA ELECTRONIC MAIL AND HAND DELIVERY

Office of the Secretary
Federal Communications Commission
9300 East Hampton Drive
Capitol Heights, MD 20743

Re: AIA Comments on Notice of Proposed Rulemaking Regarding the Telephone Consumer Protection Act of 1991

Dear Sir or Madam:

The American Insurance Association (AIA) is a national trade association based in Washington, DC, representing approximately 410 prominent U.S. property/casualty insurers that write nearly \$90 billion in premium annually. These insurers offer every kind of property/casualty insurance, including all commercial and personal lines, and conduct business in every U.S. insurance regulatory jurisdiction. We are pleased to have this opportunity to respond to the FCC's request for comments regarding various aspects of the Telephone Consumer Protection Act of 1991 (TCPA).

I. Possible Application of National "Do-Not-Call" Database to Entities Exempted from FTC Jurisdiction

Should the FCC decide to establish a national do-not-call database that would encompass entities exempted from the jurisdiction of the Federal Trade Commission (FTC), AIA recommends the implementing regulations clarify that the action is being taken pursuant to the FCC's own statutory authority under the TCPA. We also note that a database established pursuant to the TCPA would be required to observe the "established business relationship" exemption from the definition of "telephone solicitation."

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II. Unsolicited Facsimile Advertisements: Need for Legal Reform

The FCC's proposal seeks comments on the continued effectiveness of regulations implementing the TCPA's prohibition against unsolicited telephone facsimile ("fax") advertisements. AIA believes that these regulations have proven effective, and that the FCC has exercised appropriate administrative oversight. We are, however, concerned about the proliferation of lawsuits under the TCPA seeking "class action" status on behalf of individuals who have allegedly received unsolicited faxes. In this instance, application of the class action litigation procedures -- which were designed for use where meaningful legal recourse is not otherwise available -- undermines the intent of the TCPA to encourage individual citizens to seek compensation in small claims court for unsolicited faxes. Class actions under the TCPA are also inappropriate because they impose penalties on businesses wholly out of proportion to any harm.

The incongruity of class actions as a means of vindicating rights under the TCPA was recognized by the U.S. District Court for the Eastern District of Pennsylvania in *Forman v. Data Transfer, Inc.*, 164 F.R.D. 400, 405 (E.D. Pa. 1995). The court noted that certification of a plaintiff class "would be inconsistent with the specific and personal remedy provided by Congress to address the minor nuisance of unsolicited facsimile advertisements". *Forman*, 164 F.R.D. at 405. This reasoning accords with the TCPA's legislative history, as stated by Sen. Fritz Hollings (D-SC), who noted that the statutory remedy provides a sufficient incentive for individual plaintiffs "to appear before [a small claims court] without an attorney." 137 Cong. Rec. S30821-22 (1991).

Despite this clear legislative intent and reasonable judicial interpretation, some courts have certified class actions under the TCPA. As a result, many businesses have been faced with potentially -- and literally -- bankrupting verdicts in the tens of millions of dollars. As noted in *Forman*, the TCPA's \$500 minimum individual recovery for receipt of an unsolicited fax "most likely exceeds any actual monetary loss in paper, ink or lost facsimile time suffered by most plaintiffs [in an unsolicited facsimile advertisement] case." *Forman*, 164 F.R.D. at 404. Permitting recovery of class action damages in these cases is "out of all proportion to any alleged harm" to the plaintiff. *Jefferson v. Sec. Pac. Fin. Serv.*, 161 F.R.D. 63, 70 (N.D. Ill. 1995).

We recommend that the FCC consider the following courses of action to preserve the intent of the TCPA regarding unsolicited faxes:

1. Amend the regulations to clarify the adequacy of the individual remedy and the inappropriateness of the class action remedy.
2. Request that Congress amend the statute to explicitly prohibit class actions under the TCPA.

3. Intervene in class actions brought under the TCPA in opposition to certification of plaintiff classes.

Should you have any questions, please feel free to call J. Stephen Zielezienski at (202) 828-7175, or Kenneth Stoller at (202) 828-7167.

Respectfully submitted,

/s/

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/s/

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